In forma pauperis
Petition not printed

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 40

HAROLD D. ROGERS,

Petitioner,

vs.

MARK S. RICHMOND, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The first degree murder conviction which is challenged in this habeas corpus proceeding was sustained by the Connecticut Supreme Court in an opinion (R. 219) reported as *State* v. *Rogers*, 143 Conn. 167, 120 A.2d 409, *cert. denied*, 351 U.S. 952 (1956). The dissenting opinion of Justice O'Sullivan (R. 226) is reported at 143 Conn. at 178, 120 A.2d at 414.

The first opinion by Chief Judge Smith of the District Court for the District of Connecticut, sustaining the writ of habeas corpus (R. 176), is reported as *U. S. ex rel. Rogers*

v. *Cummings*, 154 F. Supp. 663 (1956). Judge Smith's opinion denying rehearing (R. 194) is unreported.

The first opinion of the Court of Appeals for the Second Circuit (R. 391), vacating the judgment of the District Court, is reported at 252 F.2d 807 (1958); its opinion denying rehearing (R. 409) is reported at 252 F.2d 812. The opinion denying petitioner's motion for a stay of the Court of Appeals' mandate (R. 415) is unreported.

The opinion of this Court, which accompanied its denial of the writ of certiorari to the Court of Appeals (R. 417), is reported at 357 U.S. 220 (1958).

On remand to the District Court, Judge Smith filed two opinions: The first, overruling respondent's motion that Judge Smith disqualify himself (R. 418), is reported at 178 F. Supp. 44 (1958). The second, discharging the writ of habeas corpus previously issued (R. 426), is reported at 178 F. Supp. 69.

The opinion of the Court of Appeals, affirming dismissal of the writ (R. 452), is reported at 271 F.2d 364 (1959). The dissenting opinion of Chief Judge Clark (R. 472) is reported at 271 F.2d 375.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1959 (R. 472). On November 12, 1959, the Court of Appeals stayed issuance of its mandate for thirty days. The petition for writ of certiorari was filed on December 10, 1959, and was granted February 23, 1960. 361 U.S. 959 (R. 489). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The foundation of this case is the due process clause of the Fourteenth Amendment. One of the important legal questions presented relates to the proper administration of relevant sections of the Judicial Code governing habeas corpus procedures. 28 U.S.C. §2241, *et seq.* These are set forth in Appendix B, *infra*. Two Connecticut statutes, relating to the illegal detention aspect of this case and the coroner's purported justification for holding petitioner incommunicado, are §§6-70 and 54-15 (Conn. Gen. Stat., 1958 Rev.). The Connecticut statutes are also set forth in Appendix B, *infra*.

Questions Presented

1. Did the courts below fail to follow this Court's opinion denying certiorari in this case, 357 U.S. 220, when they held that a district judge sitting in habeas corpus is bound *exclusively* by the state court "findings" unless the state trial transcript discloses a "vital flaw" or some other closely comparable circumstance?

2. Was it error—even assuming, *arguendo*, that a "vital flaw" or some other closely comparable circumstance is needed to authorize rejection of a state court basic "finding" and to hear testimony anew—for the courts below to fail to recognize the defective "finding" relative to petitioner's request for counsel as precisely such a "vital flaw" or circumstance, when that "finding" (1) conflicts with uncontradicted evidence before the state court, (2) was formulated by the State's Attorney and adopted verbatim by the state court, five months after petitioner's trial, as a procedural step in the state appellate process, and (3) was apparently disbelieved by the state appellate court?

3. Did the courts below, in effect, abdicate to the state courts the duty of the federal District Court to determine independently the constitutional issue of the voluntariness of the confessions?

4. Even assuming, *arguendo*, that the courts below were bound by the state court "finding" that petitioner did not ask to see his lawyer during his first interrogation, do the facts, which are undisputed on the state trial transcript, standing alone, as Judge Clark concluded, add up to a coercive pattern which voids the incriminating statements and the conviction and death sentence based thereon?

5. Did the State authorities, in denying petitioner's request to consult his privately retained counsel and in denying counsel's request for consultation with petitioner prior to petitioner's making statements incriminating him in a capital crime, deprive petitioner of the right to effective aid of counsel guaranteed in capital cases by the due process clause of the Fourteenth Amendment?

Statement

In this habeas corpus action petitioner challenges on Fourteenth Amendment grounds the validity of his 1954 conviction of murder in a Connecticut state court. For the purpose of this statement, proceedings over the last six years are dealt with in three parts: (I). The events in the state courts terminating in petitioner's unsuccessful petition to this Court for a writ of certiorari to review the judgment of affirmance of the Connecticut Supreme Court of Errors. 351 U.S. 952. (II). The first phase of the federal habeas corpus proceeding initiated in the United States District Court for the District of Connecticut in 1956, and terminated in 1958 with this Court's denial *with opinion*, 357 U.S. 220, of petitioner's application for a writ of cer-

tiorari to review the judgment of the Court of Appeals for the Second Circuit which had vacated the District Court judgment sustaining the writ of habeas corpus. (III). The events in the District Court and the Court of Appeals subsequent to this Court's opinion denying certiorari.

I. *Proceedings in the State Courts*

Petitioner Harold D. Rogers, a Negro with an eighth grade education (R. 176), has been confined in a death cell at Connecticut's Wethersfield State Prison for over six years (R. 175). In May of 1954 he was tried in the Superior Court of New Haven County for the fatal shooting of Dorothy Kennedy in the course of the robbery of her husband's liquor store on November 21, 1953 (R. 279, 283). Petitioner was found guilty by the jury, and thereafter was sentenced to death (R. 171, 172).

At petitioner's trial, the chief evidence against him, in addition to his possession of what was alleged to be the weapon which shot Mrs. Kennedy, consisted of two incriminating statements (R. 325-369) elicited from petitioner after lengthy interrogations on January 30 and 31, 1954, at a time when he was in custody and awaiting trial for a quite unrelated charge of attempted robbery of a New Haven, Connecticut, hotel (R. 176; Pet. Ex. B, R. 485, 6).

At the trial, petitioner objected on Fourteenth Amendment grounds to the admission in evidence of the two incriminating statements (R. 303, 304, 307), but the trial judge overruled the objections and the statements were submitted to the jury (R. 307, 310, 317, 320). Petitioner was found guilty by the jury and thereafter was sentenced to death (R. 171, 172).

One hundred thirty-five days after the jury returned its verdict (R. 282, 322) the trial judge—as a part of the process for preparing the case for appeal to the Connec-

ticut Supreme Court of Errors—adopted as his own and filed lengthy "findings" prepared by the State's Attorney with respect to the admissibility of the incriminating statements (R. 314-320). The state court's "findings" dealing with the admissibility of the incriminating statements were annexed as an appendix to the opinion by the court below (R. 465-472). A certified copy of the suggested "findings" given the state court by the State's Attorney is reproduced in Appendix A to this brief, *infra*, along with the state trial court's "findings."

On appeal, the Connecticut Supreme Court of Errors, in an opinion by Justice Wynne, affirmed petitioner's conviction. The state court characterized the issue before it as "whether, under these and other circumstances of the case, that conduct [surrounding the making of the statements] induced the defendant to confess falsely that he had committed the crime being investigated" and, at another point, "whether this conduct induced the defendant to make an involuntary and hence untrue statement" (R. 222, 223). Justice O'Sullivan, expressing particular concern with the fact that petitioner had not been permitted to consult his previously-retained counsel[1] and noting that "[t]hose who

[1] As has been noted, petitioner was in custody awaiting trial on a charge of attempted robbery and other related crimes (Pet. Ex. B; R. 485, 6) at the time the New Haven police started interrogating him in connection with the shooting of Mrs. Kennedy. As the police well knew (R. 60), petitioner had theretofore, for three weeks prior to this interrogation, been represented by his own privately-retained attorney, the late Thomas R. Robinson (and also by Mr. Robinson's then associate, Chester T. Corse). Mr. Robinson (and Mr. Corse) continued to represent petitioner in connection with the more serious murder charge. The basis of this representation changed in a single respect—i.e., that after the graver charges were preferred and petitioner's limited funds were exhausted, Mr. Robinson represented petitioner in Mr. Robinson's public capacity as Public Defender for New Haven County rather than pursuant to the private retainer which had been the initial form of the attorney-client relationship.

As Public Defender Mr. Robinson represented petitioner throughout the murder trial in the state courts, on appeal to the Con-

become suspect do not thereby become the chattels, so to speak, of the investigators," dissented (R. 229).

This Court denied certiorari. 351 U.S. 952 (1956).

II. *The Habeas Corpus Proceeding: First Phase*

On August 22, 1956, petitioner, pursuant to 28 U.S.C. §2241 *et seq.*, sought a writ of habeas corpus, alleging that the use of the incriminating statements and the State's denial of consultation with counsel invalidated the Connecticut judgment (R. 152-167). Petitioner requested a "full and complete hearing" and relief from his unconstitutional detention (R. 166).

On August 23, 1956, Chief Judge Smith of the District Court for the District of Connecticut ordered a hearing on the petition for August 31, 1956 (R. 166-167). At the hearing, respondent[2] filed his return to the writ, in which

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necticut Supreme Court of Errors, on the first petition for certiorari in this Court to obtain direct review of the conviction, and in the first phase of the present habeas corpus proceeding. In 1957, after Judge Smith had granted habeas corpus and while the case was pending before the Court of Appeals for the first time, Mr. Robinson died. He was succeeded as Public Defender for New Haven County by the late Lawrence M. Dooley, who represented petitioner before the Court of Appeals at the time of the first appeal.

After the decision of the Court of Appeals vacating Judge Smith's first judgment Mr. Dooley sought, but was unable to secure from former Chief Justice Wynne of the Connecticut Supreme Court of Errors, the authorization which under the Connecticut practice a Public Defender must have in order to prepare a petition for certiorari for filing in this Court (R. 412). Thereafter, Mr. Dooley received permission to withdraw as petitioner's counsel (R. 413). In subsequent proceedings petitioner has been represented by one or both of petitioner's present counsel pursuant to orders of appointment successively entered by the Court of Appeals and Judge Smith (R. 450, 451).

[2] Originally, there were three named respondents in this action due to the fact that the administration of the Connecticut State Prison was in a transition stage. This explains occasional references in the record to "respondents," e.g. R. 182. On October 29, 1956, the present warden, Mark S. Richmond, was substituted as party respondent (R. 73).

he denied the substantive allegations of the writ, but made no objection to the holding of the August 31, 1956 hearing (R. 169). At the hearing, Judge Smith heard testimony from all of the witnesses called both by petitioner and by the State's Attorney and accepted all documentary evidence submitted by both parties (R. 4-73). Respondent, who called three witnesses on his behalf and cross-examined the three called on behalf of petitioner (R. 2), at no time objected to the taking of testimony at the hearing (R. 4-73).

The documentary evidence submitted by the parties included almost all of the transcript of the testimony taken by the state trial judge in passing on the admissibility of the challenged confessions. The only testimony taken before the state trial judge which was not submitted to Judge Smith in documentary form was that of two witnesses called by petitioner, Deputy Jailer Patterson and Sheriff Redding. Patterson was cross-examined by the State for less than a page, and Redding was not cross-examined at all (R. 435-446). Both Patterson and Redding, called as witnesses by petitioner, testified in person before Judge Smith at the August 31, 1956 hearing (R. 5-20) and were cross-examined by the State's Attorney (R. 15, 16, 19). Judge Smith also heard the testimony of petitioner, called in his own behalf (R. 20-41), and the testimony of three police officers who had not testified at the state trial, who were called on behalf of respondent (R. 41-73).

With all of the evidence offered by the parties before him, Judge Smith, on September 19, 1956, found as follows:

> "Rogers was arrested in New Haven January 9, 1954, charged with attempted robbery of the Travelers Hotel on that date. He retained counsel, and on January 13, 1954, waived examination in New Haven City Court and was bound over for trial to the Superior Court,

April Term. While he was lodged in New Haven County Jail, on the morning of January 30, 1954, ballistic tests on a gun found in his possession at the time of his arrest determined that it had been used in the fatal shooting of Mrs. Kennedy in the holdup of a liquor store in West Haven on the evening of November 21, 1953. The gun had been stolen from his niece's house prior to the evening of November 21, 1953. On the order of the state's attorney he was removed from the jail without court order for questioning at the state's attorney's office. Until he confessed he was kept unavailable to his counsel. He claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made. He was not warned of his right to say nothing or that what he said could be used against him. Questioned intermittently for some eight hours by the county detective, two New Haven and two West Haven police in relays, during which the gun was on the table before him, he steadfastly denied implication in the Kennedy shooting. He was handcuffed, but was allowed to smoke. He was given coffee and hamburg, one hand being released from the cuffs, which were then fastened to the chair arm, while he smoked and ate. He was taken to the men's room when he requested it. No physical violence or threats of physical violence were used. When the interrogators were unable to obtain any admission in the eight hour questioning, Captain Eagan of the New Haven police was called in. After questioning for some time, Capt. Eagan threatened to bring in for questioning Rogers' wife if Rogers did not confess. He threatened to send the two foster children of the Rogers', who were state wards, to an institution meanwhile. Mrs. Rogers suf-

fered from arthritis, but was able to attend the trial. Eagan made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession, completed at 1:00 a.m., 13 hours after the beginning of the questioning. He was then returned to the jail. The next morning, January 31, the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out, if the original confession was repudiated, he repeated it for the coroner. One or two days thereafter the order that he be held incommunicado was rescinded. On his trial the confessions were admitted in evidence, the court finding on preliminary hearing in the absence of a jury that they were voluntary, and submitting to the jury the question of the weight to be given them, but refusing a requested instruction that the jury might disregard them in whole or in part if it found them involuntary. The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part." 154 F. Supp. 664-65 (R. 176-177).

On the basis of these detailed and carefully considered findings, Judge Smith articulated their constitutional implications:

"Rogers gave in to a threat which in itself, separated from the surrounding circumstances, might not be likely to cause a confession to a capital crime. It was applied, however, after more than eight hours of questioning, at a place removed from the jail, by which time it must have been obvious to Rogers that the counsel he had engaged was not to be allowed to see him and advise him on the new charge of a capital offense. That charge was first made known to him after his removal from the jail that day. The state's treatment of Rogers as a chattel of the investigators (see dissenting opinion of O'Sullivan, J., *State* v. *Rogers,* 143 Conn. 167, 181, 129 A.2d 409) moved around regardless of law and denied access to counsel must have had a coercive effect. We may give it weight in conjunction with other facts even if we do not hold illegal treatment in itself necessarily productive in every case of a coerced confession violative of due process. When Rogers gave in to the threat to bring in his wife and children it must be held under all the circumstances here that he lacked sufficient mental freedom to make his confession voluntary. Its use in the trial to convict him is not consonant with the requirements of due process. The second confession the next day while still held incommunicado, although pro forma at least advised of a right to counsel; is also of doubtful admissibility. In any case, since the first coerced confession was admitted in evidence, and it cannot be said from the record what weight was given it, the judgment of conviction is invalid. *Stein* v. *New York,* 346 U.S. 156, 191-192, 73 S.Ct. 1077; *Cranor* v. *Gonzales,* supra, 226 F.2d.at page 90.

Rogers may be a thoroughly depraved individual, but his execution on a conviction based on confessions obtained under the circumstances outlined in this case

may well establish a precedent endangering innocent men in the future. Constitutional safeguards would be weakened by a finding that confessions so obtained may be considered voluntary and in accord with present concepts of due process of law." 154 F. Supp. at 666-67 (R. 179-180).

In consonance with these conclusions, Judge Smith ordered petitioner discharged from custody unless granted a new trial (R. 181).

The State's Attorney subsequently filed a 51 paragraph affidavit (R. 182-194) in support of respondent's motion to amend and supplement findings and for a rehearing, which raised no objection to the fact that Judge Smith held the August 31, 1956 hearing. At the hearing on the motion to amend respondent submitted as exhibits: the state court "findings" filed some five months after the trial (R. 284, 322), contained in the appellate record for the Supreme Court of Errors (R. 278-324), the two incriminating statements elicited from petitioner (R. 325-346, 347-369), and the State's brief in the Supreme Court of Errors (R. 370-389). Judge Smith made seven additional findings primarily for purposes of amplification of the time element and denied rehearing (R. 195-196). The four exhibits submitted by the State's Attorney were rejected by Judge Smith on the ground that there was no "sufficient allegation of any evidence which by due diligence could not have been presented at the original hearing to justify a new trial or rehearing" (R. 195).

On appeal, for the first time respondent attacked the propriety of Judge Smith's holding a hearing and his failure to call for the limited part of the state record not furnished by the parties. The Court of Appeals vacated the judgment of the District Court and remanded for fur-

ther proceedings (R. 399). The Court of Appeals concluded that Judge Smith had erred in failing "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions . . . " (R. 397).

> "We conclude, therefore, that on remand the judge below should take such steps as will assure him that he has in evidence not only the findings of the trial court as to the admissibility of the confessions, but also the transcript of the preliminary hearing on which the trial findings were based." 252 F.2d at 811 (R. 398).

Having remanded the case to the District Court for consideration of the minor portion of the state court record not submitted to the District Court prior to its decision, the Court of Appeals went on to hold that on remand Judge Smith should, unless extraordinary circumstances present themselves, confine himself exclusively to the state trial court's "findings":

> "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* v. *Allen* (344 U.S. 443), we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court." 252 F.2d at 811 (R. 398-399).

Feeling that the opinion of the Court of Appeals was a misapplication of this Court's decision in *Brown* v. *Allen*, 344 U.S. 443 (1953), petitioner sought rehearing (R. 400-409). The petition was denied in an opinion in which the Court of Appeals stated that in "no respect do we deviate from our original opinion" (R. 411).

Petitioner then sought a writ of certiorari to review the judgment of the Court of Appeals. This Court denied the

petition for certiorari, *Rogers* v. *Richmond*, 357 U.S. 220 (1958) (R. 417-418), and accompanied its denial with the following *per curiam* opinion:

> "The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U.S. 443, 506, *et seq.*" (R. 418).

III. *The Habeas Corpus Proceeding: The Present Phase*

On remand to the District Court, the State's Attorney moved to disqualify Judge Smith. The affidavit of respondent, Warden Mark S. Richmond, accompanying the motion, alleged that Judge Smith had, as evidenced by his original decision sustaining the writ of habeas corpus, "a prejudgment of the issues in this case and a personal bias against the detectives involved and in favor of the cause of the relator" (R. 418). After argument, Judge Smith ordered the affidavit accompanying the motion stricken as being insufficient and denied the State's Attorney's motion (R. 450). A formal opinion was filed on July 16, 1958. 178 F. Supp. 44 (R. 418-425).

On July 15, 1958, in compliance with the Court of Appeals' directive to consider all the state court testimony and "findings" relating to the character of the confessions, the District Court received in evidence the "findings" relating to the admissibility of petitioner's incriminating statement filed by the state trial court subsequent to the trial (R. 314-320) and the state court transcript of the testimony of the five witnesses who testified in the absence of the jury on the issue of the voluntariness of the incriminating statements (R. 450). As noted, a transcript of the testimony of three of these five witnesses (Pet. Ex. F,

R. 230-263, 73) had been received in evidence by Judge Smith at the first hearing in 1956. Subsequently, on September 26, 1958, the District Court received in evidence the entire state trial transcript (Res. Ex. X, R. 451), the alleged incriminating statements (Res. Ex. AB, R. 325-346, 451; Res. Ex. AC, R. 347-369, 451) and the state court appellate record (Res. Ex. AA, R. 278-324, 451).

On October 13, 1958, Judge Smith entered a judgment dismissing the petition for habeas corpus (R. 435). His memorandum opinion (R. 426-435) explained at length why, under the instructions of the Court of Appeals as interpreted by this Court's opinion denying certiorari, he felt obliged to decide against petitioner *even though he still felt that petitioner's conviction and death sentence were the product of a denial of petitioner's rights under the Fourteenth Amendment* (R. 433-434).

The paradox is explained by Judge Smith's conclusion that "under the limitations now applied" (R. 434) he was not authorized to take testimony on the voluntariness of the challenged confessions—or to consider the testimony he had already taken—unless the state transcript disclosed a "vital flaw" in the state court's inquiry or such other (unspecified) "unusual circumstance" as would "justify such a course" (R. 430-431). Since he found no such "vital flaw" or other "circumstances", he felt compelled to decide the constitutional issues on the basis of the historical facts found by the trial court.

The District Court followed the strict dictate of the Court of Appeals command to "confine itself to analyzing the historical facts as found by the state trial court" (R. 427-428), although recognizing that "on its face" this Court's opinion meant:

> "... The District Judge, after examining the record of the state proceedings, is free to accept the state factual

> determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations, unless his examination of the state proceedings reveals some 'vital flaw', in which instance the implication is that he cannot accept the state determination but *must* call for testimony" (R. 429). (Emphasis in original.)

Judge Smith rejected this "face" meaning of this Court's opinion. In terms of concrete factual analysis this meant that he also felt obliged to reject his own conclusion that petitioner had asked to see his lawyer during the first interrogation in deference to the contrary state court "findings"—filed five months after the trial—that petitioner had made no such request (R. 317). Nor did Judge Smith regard the state court's "findings" on this issue a "vital flaw" or "unusual circumstance" which would permit him to reject the state "findings" or to take note of the testimony *he* had taken. Judge Smith refused to consider the "findings" on the counsel point a "vital flaw" or "unusual circumstance" even though Chief Eagan, the only State's witness before the state judge who even purported to dispute petitioner's claim that he had asked to see his lawyer, was not present for the first seven hours of the interrogation, the period of time during which petitioner testified he asked to see his lawyer:

> "... It is true, as relator claims, that the positive finding of no request has no support in the evidence for the time (some seven hours) prior to Chief Eagan's arrival, since the only testimony as to that period was Rogers' testimony that he had made the request. However, the burden was on Rogers, and elimination of the positive finding of no request would leave him no better off, if the judge disbelieved his testimony, as he

appears to have done. The judge ruled at the conclusion of the hearing that the confessions were voluntary, even though the formal findings were not made until months later. This court on trial of the same issue de novo credited Rogers' statement that he had asked to see his counsel, although the recollection of the police officers at that time, some two and one half years after the questioning, was that he had not made such a request. It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer. The probabilities are strong that a prisoner represented on another charge by able counsel of many years experience as public defender, when questioned intermittently for hours on the commission of a capital crime would ask to see his lawyer. In that respect the subordinate findings differ. Such a finding depended on observation of Rogers on the stand and judgment as to Rogers' credibility as a witness. There was no unfairness or lack of due process in the consideration of this issue in the state court, although on similar evidence, if properly before it, this court would reach the opposite finding" (R. 432, 433).

Judge Smith's conclusion that he could not re-examine the state court's "findings" that petitioner had not asked for counsel was of crucial importance; he made it plain that were he at liberty to reject the state "finding" and to give weight to the testimony he had taken and credit his own judgment on this "historical fact," he would have persisted in his original holding that petitioner's conviction was void:

"... Were these confessions the free and voluntary acts of Rogers or was his will so overborne by pressures that they should be considered the product of coercion?

The state court decided the former, this court would find the latter on underlying facts found, differing in the respects mentioned, if this court were free to reject the state court findings and try the issue de novo. The pressures used, aside from the deprivation of counsel, were not as great as those used and condemned in many cases. Yet, there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to abandon his denials and make the confession, repeated the next day before the coroner. Aside from the denial of access to counsel, the other circumstances might not singly or together have broken down his resistance. On the facts as they appeared to this court, taken together, against the background of his knowledge that although he had counsel he would not be permitted to reach him, it seemed reasonable to conclude that they overbore his will to resist and brought about a confession not truly voluntary or free" (R. 433, 434).

However, said Judge Smith:

"Considering the full state trial record anew, to determine whether other evidence should be considered, however, and ignoring as we must for this purpose the impressions made on the trial here, there do not appear to be any circumstances which under the limitations now applied would permit retrial here of the issue of voluntariness of the confessions" (R. 434).

Even though Judge Smith did state that the district judge "must independently determine whether the con-

viction may constitutionally stand" (R. 432), certain language in his opinion indicates that he not only deferred to the state trial judge's belated "findings" with respect to the basic facts, but also to the state judge's conclusion as to the coercion issue:

> "... This court is bound by the findings of the state trial court that no request for counsel was made, *and that the confessions were voluntary* ..." (R. 430). (Emphasis added.)

Simultaneously with the issuance of his opinion on remand, Judge Smith, on his own motion, issued a certificate for probable cause for appeal (R. 435) and later authorized petitioner to proceed *in forma pauperis* (R. 451). On November 13, 1958, petitioner appealed to the Court of Appeals (R. 451) which heard the appeal on April 13, 1959.

On October 28, 1959, the Court of Appeals affirmed Judge Smith's decision in an opinion by Judge Moore in which Judge Swan joined (R. 452-472). Chief Judge Clark filed a dissenting opinion (R. 472-482).

Judge Moore and Judge Swan held that Judge Smith had complied with the Court of Appeals' mandate, as interpreted by this Court, in confining his attention exclusively to the "findings" belatedly entered by the state trial judge—"findings" which Judges Moore and Swan regarded as important enough to annex to their opinion as an appendix (R. 465-472). The majority also held that, on the assumption that petitioner had not asked to see his lawyer, Judge Smith's second conclusion that the confessions were voluntary was not "clearly erroneous" (R. 462, 463).

Judge Clark, in dissent, viewed this Court's opinion denying certiorari as a substantial qualification of the Court of Appeals' earlier mandate—an "actual denigration of our previous decision" (R. 478). This placed Judge

Smith in "somewhat of a dilemma in having two appellate masters to serve" (R. 479). Understanding Judge Smith's difficulty, Judge Clark concluded that Judge Smith "was too modest and that under the Supreme Court ruling he was both entitled and bound to act normally as a judge and thus to credit his own natural and sincere judicial conclusions" (R. 479). Judge Clark demonstrated that under the scope of review adopted by the majority of the Court of Appeals "federal constitutional review of coerced confessions . . . will become quite, if not wholly illusory"—a "rubber stamp" of the state holding (R. 479, 480).

Alternatively, Judge Clark concluded that, even if Judge Smith were compelled to accept the state court "finding" that petitioner had not asked to see his previously retained counsel, the state conviction had to be set aside:

> "For it seems to me that on the admitted and incontrovertible facts these confessions cannot be considered 'voluntary' in any real meaning of the word—indeed, that however they may be characterized, that adjective is singularly inappropriate" (R. 473).

Finally, Judge Clark, from his wealth of knowledge of Connecticut procedure, took strong exception to the majority's reliance on the state court "findings"—both from the probative point of view and as being equivalent to judicial findings of fact in the conventional sense of the term:

> "My brothers attach such importance to the detailed and numbered findings of the state trial court that they reproduce this material in their appendix. Now the basic facts there recited, without the embellishments added, do show the far from voluntary character of the confessions. But in thus lending emphasis to these

elaborations upon the underlying facts, I think my brothers have overlooked the unique character of findings of fact in Connecticut appellate practice; for there they serve only as steps in appeal, and not as aids to the adjudication itself. So on all appeals, civil and criminal, and in jury as well as court cases, findings are made after the judgment, but only on request of the appellant and with both sides submitting drafts thereof. Conn. Prac. Bk. 1951, §§385-400, 406, 410, and Forms 558-563; Maltbie, Appellate Procedure in the Supreme Court of Errors of Connecticut 129 (2d Ed. 1957). In practice the judge tends quite naturally to accept the version presented by the party for whom he has decided. So here the findings were filed five months after the decision and trial and were those presented by the State. Hence they include what are quite obviously argumentative conclusions or deductions which are not facts in any true sense, but do properly represent the State's claims as to the ultimate judgment to be rendered" (R. 475, 476).

On November 12, 1959, the Court of Appeals stayed issuance of its mandate for thirty days to permit the preparation and filing of a petition for writ of certiorari. On December 10, 1959, petitioner filed his motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari, both of which this Court granted on February 23, 1960 (R. 489).

Summary of Argument

Without objection by respondent, Chief Judge Smith of the District Court for the District of Connecticut held a hearing in this habeas corpus action and accepted all documentary evidence offered by both parties. At the hearing,

respondent called three witnesses on the State's behalf and cross-examined the three called on behalf of petitioner. With all the evidence before him, Judge Smith concluded that "The confessions were the result of pressure overcoming Rogers' power of resistance and were not voluntary on his part" (R. 176, 177).

On appeal the Court of Appeals vacated the District Court judgment and ordered Judge Smith to make his determination on the coercion issue exclusively on the basis of the state court "findings of fact"—"findings" which, as Judge Clark noted in dissent on the second appeal, "serve only as steps in appeal and not as aids to the adjudication itself" (R. 475) and which were filed five months after the trial and adopted verbatim from suggested "findings" filed by the State.

On remand Judge Smith again noted the coerced nature of the confessions (R. 433, 434), but under the "limitations" imposed by the Court of Appeals considered himself bound to the state court "findings"—including the "finding," which, as Judge Smith pointed out, has "no support in the evidence" (R. 432), that petitioner had not requested counsel at the first of two interrogations to which he was subjected (which was the first time he was advised that he was to be questioned about a murder charge rather than about the very different charge for which he was in custody). The majority below affirmed the limited review adopted by Judge Smith on remand.

I. This Court has noted that "where there is a genuine conflict of evidence, great reliance must be placed upon the finder of fact," *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960), but the judgment of the Court of Appeals preventing Judge Smith from adjudicating the blatant deprivations of constitutional rights would distort this salutary rule by finding "genuine conflict" where there is

none and by demanding uncritical aequiescence in the recitations of a state "finder of fact".

Certainly, the blatant defectiveness of the state court "findings" is ample justification for a district court to hold a hearing—particularly when, as here, the hearing was never objected to by respondent until the matter reached the Court of Appeals—or, at the very minimum, to examine uncontradicted testimony given in the state trial. To bind the District Court exclusively to the state court "findings," as the Court of Appeals has done, and thus to sacrifice petitioner's life on the altar of findings of this sort would (1) render the Fourteenth Amendment an "illusory safeguard," *Blackburn* v. *Alabama, supra,* 361 U.S. at 209, and (2) undercut the power given "the lower federal courts . . . "—as an expression of the choice of Congress for the assertion of the "superior authority of federal law"—"to inquire into federal claims by way of habeas corpus." *Brown* v. *Allen,* 344 U.S. 443, 508, 509, 510 (1953).

The successive rulings of the court below effectively emasculated the discretion of the District Court to conduct a hearing intended to "better enable . . . that court to determine whether any violation of the Fourteenth Amendment occurred." *Brown* v. *Allen, supra,* 344 U.S. at 478. And, indeed, those rulings ignore the opinion of this Court in *this very case*:

> "We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen,* 344 U.S. 443, 506 *et seq.*" (R. 418).

Upon emancipating the District Court from the limited review which chained it to the state court's "findings," this Court should affirm Judge Smith's original conclusion that both of petitioner's statements were coerced (R. 177). Actually, Judge Smith's conclusion that the two statements were coerced was the only conclusion he could reach on the evidence properly before him. Manifestly, that conclusion is not "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. Indeed, respondent has never claimed as much.

II. Even if the evidence adduced at the August 31, 1956 habeas corpus hearing is ignored, the facts which are undisputed on the state trial transcript add up, as Judge Clark pointed out in his dissent below (R. 473-475), to a coercive pattern which voids petitioner's incriminating statements, his conviction, and the death sentence, under the traditional principles which this Court has adopted for reviewing confessions challenged under the Fourteenth Amendment.

III. Moreover, the State, in denying petitioner's request to consult his previously retained counsel when he first learned he was a murder suspect and in denying his counsel's request for consultation with petitioner the following day, deprived petitioner of the right to effective aid of counsel guaranteed in capital cases by the due process clause of the Fourteenth Amendment. These two deprivations of counsel (from each of which, it may be noted, an incriminating statement ensued) form an alternative basis upon which this Court should instruct the District Court to issue the writ invalidating the challenged statements and petitioner's conviction and death sentence.

I. In Binding the District Judge "Exclusively" to the State Trial Judge's "Findings"—When the "Findings" Were Contrary to the Undisputed Testimony in the State Court Transcript—the Court of Appeals Ignored This Court's Prescription for the Resolution of Due Process Issues Arising in State Criminal Prosecutions.

A. A State Court Finding Which Has "No Support in the Evidence" Cannot Foreclose a District Court's Fresh Inquiry Into Uncontradicted Testimony.

As Judge Smith recognized on remand, the crucial state court "finding" [3] that petitioner did not ask "at any time" (R. 468) to see his attorney has "no support in the evidence" (R. 432). Although he realized the significance of the defective "finding" with respect to the due process issue at stake—"aside from the denial of access to counsel, the other circumstances might not singly or together have broken down his resistance" (R. 434)—Judge Smith was obligated, under instructions of the Court of Appeals, to determine the constitutional issues exclusively on the basis

[3] Under Connecticut appellate procedure, the Finding is a lengthy recapitulation of events in the trial court prepared by the trial judge, after receipt of a draft finding by the appellant and a counter finding by the appellee. Connecticut Practice Book §389 (1951 Ed.); Maltbie, Connecticut Appellate Procedure §§129, 130 (2 Ed. 1957). Under the literal Connecticut nomenclature, the Finding, then, refers to the entire document adopted by the trial judge and includes the claims of the plaintiff as to facts proved; the claims of the defendant as to facts proved; the requests to charge; the charge as given; and the rulings made in the course of the trial. Maltbie, *supra*, §144. The entire Finding in petitioner's state court case covers 38 pages (R. 284-322). As used by the courts below, however, the term "findings" refers not to the 145 numbered paragraphs in the entire Finding, but to the 61 specific paragraphs which refer to the admissibility of petitioner's two incriminating statements (R. 314-320). These are attached as an appendix to the opinion of the court below (R. 465-472). Petitioner, in this brief, uses the term in the non-literal sense used by the courts below.

of the state trial judge's "findings" (R. 399, 427). As Chief Judge Clark emphasized, in dissent in the court below, whether or not petitioner asked to consult counsel "is obviously important, as *everyone* seems to concede that if the request was made and refused the confessions cannot be received" (R. 473). (Emphasis added.)

In affirming Judge Smith's exclusive reliance on the state trier's "findings", the Court of Appeals noted: "we see no valid reason for substituting the intuitive inferences of an able and conscientious federal judge . . . for those of an able and conscientious state trial judge . . . " (R. 461).

Of course there is "valid reason". The immediate and transcendent reason is that the state trial court's "finding" that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney" (R. 468) has, as Judge Smith pointed out, "no support in the evidence" (R. 432); whereas Judge Smith's finding that petitioner did request counsel (R. 176, 433) has, as Judge Clark pointed out, "solid support of record in Rogers' very explicit testimony and in the natural probabilities" (R. 476).

The only witness at the state trial who even appears to speak to the issue concerning petitioner's request for his lawyer was Chief Eagan, who, by his own testimony, *did not* (and, indeed, could not) *testify about the period when he, Eagan, was not present and when petitioner, according to petitioner's testimony, first asked for counsel* (R. 233, 237). Chief Eagan merely denied that petitioner asked *him* for permission to consult counsel, and Chief Eagan admitted that he did not inform petitioner that he was entitled to counsel and that "Under the circumstances, I don't think I would" have informed counsel if a request to speak to him had been made (R. 237). The State did not, in the state court trial, seek to refute petitioner's testimony that

he asked to see his lawyer (R. 241) by calling any of the detectives who were present prior to Chief Eagan's arrival when the claimed requests for counsel were made. *Indeed, two of these detectives—whom the State might have called but elected not to—were physically present in the state court during the trial* (R. 64, 67, 70).[4]

Having heard petitioner's testimony and the testimony of the three detectives whom the State finally decided to call to testify at the August 31, 1956 habeas corpus hearing two and a half years after the events described took place, Judge Smith found:

> "He [petitioner] claims that he was denied a request to see his counsel, which request the state's witnesses deny was made. That he made such a request seems most probable, and the Court finds that it was made" (R. 176).[5]

On remand, reflecting upon this issue for the second time, Judge Smith made it clear that if he were not bound by the state court "findings" he would rule that petitioner requested to see his attorney at the State's Attorney's

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[4] The failure of the State to call the available detectives to rebut petitioner's testimony in the state trial cannot be in any way justified on the basis of inadvertence. The attorney representing petitioner at the trial challenged the State to refute petitioner's testimony:

> ". . . I would assume that the State would wish to make at least some claim with regard to the two o'clock period to which this witness [Eagan] says—about which this witness says he knows nothing . . ." (R. 239).

[5] On the basis of this finding in the initial decision by Judge Smith, respondent, on remand, moved for the disqualification of Judge Smith because he showed a "personal bias against the detectives involved and in favor of the cause of the relator Rogers" (R. 418). Judge Smith ordered the affidavit accompanying the motion stricken as being insufficient and denied the State's Attorney's motion. 178 F. Supp. 44 (R. 450).

office—and he amplified his reason for crediting petitioner's testimony in preference to that of the detectives:

> "This court on trial of the same issue de novo credited Rogers' statement that he had asked to see his counsel, although the recollection of the police officers at that time, some two and one half years after the questioning, was that he had not made such a request. It is quite natural for their recollection after so long a period to coincide with the version they must subconsciously prefer. The probabilities are strong that a prisoner represented on another charge by able counsel of many years experience as public defender, when questioned intermittently for hours on the commission of a capital crime would ask to see his lawyer" (R. 433).

In view of the overwhelming likelihood—stressed by Judge Smith and Judge Clark—that petitioner would have wanted to communicate with his previously retained lawyer as soon as he found himself a murder suspect, it is hardly surprising that the majority of the Connecticut Supreme Court of Errors assumed (R. 222)—and that Justice O'Sullivan in his dissent flatly stated (R. 227)—that petitioner *had* asked to see his lawyer.

The Court below attempted to justify its command that there must be exclusive reliance on the state court "findings" by claiming the two triers reached different conclusions as to petitioner's credibility (R. 461). However, even if the state judge disbelieved petitioner's uncontradicted testimony, there would be no basis for him to make a positive finding to the contrary. Nor is there any justification for the implication by the court below that the testimony of petitioner and Chief Eagan was in conflict (R. 461). Chief Eagan admitted he knew nothing of what petitioner had said prior to his arrival (R. 237)—the period

when petitioner said he first asked for counsel. "The Fourteenth Amendment would be an illusory safeguard indeed if testimony of this nature were held to raise a 'conflict' which would preclude . . . review . . . " *Blackburn* v. *Alabama, supra*, 361 U.S. at 209.

In applying the constitutional standards which the due process clause ordains as limitations upon state criminal prosecutions, this Court in the *Blackburn* case recently has determined that "[W]here there is a genuine conflict of evidence, great reliance must be placed upon the finder of fact." 361 U.S. at 208. In *Blackburn*, "[A]fter according all of the deference to the trial judge's decision which is compatible with our duty to determine constitutional questions," 361 U.S. at 205, this Court ruled that a counter deposition supplied by the state was in "such hopeless internal conflict that it raises no genuine issue of fact," 361 U.S. at 209, with the depositions of two psychiatrists submitted by Blackburn. In the case at bar, then, where there was no contrary evidence concerning petitioner's request for counsel prior to Chief Eagan's arrival (R. 432), there is no genuine conflict. And, as *Blackburn* demonstrates, absent a genuine conflict of evidence, a federal tribunal is not foreclosed, by the label of "findings," from an inquiry of undisputed testimony.*

In binding Judge Smith "exclusively" to the "findings"—the most crucial of which had, in Judge Smith's view,

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* The *Blackburn* case, to be sure, was heard by this Court on direct review of the decision of the Alabama Court of Appeals. However, in *Cicenia* v. *Lagay*, 357 U.S. 504 (1958), a habeas corpus action reviewed by this Court on its writ of certiorari to the United States Court of Appeals for the Third Circuit, this Court applied its familiar undisputed facts doctrine: "An *independent examination* of the record satisfies us that . . . " 357 U.S. at 508. (Emphasis added.)

"no support in the evidence" (R. 432)—the Court of Appeals established for Judge Smith a scope of review more constricted than the inquiry of this Court over state convictions on direct review. For under the "undisputed facts" scope of review, a state court finding—contrary to the uncontradicted testimony in the record—cannot foreclose this Court from considering the undisputed testimony:

"... [facts undisputed by the state] means not only admitted facts but also those that can be classified from the record as without substantial challenge." *Gallegos* v. *Nebraska*, 342 U.S. 55, 61 (1951).

"Where the claim is that the prisoner's statement has been procured by such means [coercion] we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. *If the evidence bearing on the question is uncontradicted*, the application of the constitutional provision is unembarrassed by a finding or a verdict in a state court . . . " *Lisenba* v. *California*, 314 U.S. 219, at 237-238 (1941). (Emphasis added.)

"Enforcement of the criminal laws of the States rests principally with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—*as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings*—are not this Court's concern; yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance

of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.'" *Payne* v. *Arkansas*, 356 U.S. 560, 561, 562 (1958). (Emphasis added.)

If undisputed testimony can be viewed by this Court despite state court "findings" to the contrary, then the district courts—which, unlike this Court, are equipped to hold hearings, 28 U.S.C. §2241-55 (1952)—should most certainly be afforded the same leeway. For the Congress has also chosen the district courts, not just exclusively this Court, to express the "superior authority of federal law." *Brown* v. *Allen*, *supra*, 344 U.S. at 510.

As Judge Clark, profoundly expert in his own state's procedure, so clearly demonstrated, the majority below "overlooked the unique character of findings of fact in Connecticut appellate practice; for there they serve only as steps in appeal, and not as aids to the adjudication itself. . . . So here the findings were filed five months after the decision and trial and were those presented by the State" (R. 475).

Moreover, Judge Clark detailed the insufficiency of the "findings" on other facts besides the counsel point:

> "Hence they include what are quite obviously argumentative conclusions or deductions which are not facts in any true sense, but do properly represent the State's claims as to the ultimate judgment to be rendered. An example is No. 103: 'The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.' Certainly no judge can know this as a fact; he can only deduce it as a conclusion and one (I submit) with no obvious support in the record.

"Particularly to be noted in this connection are the mutually inconsistent or alternative claims of Nos. 105 and 106; the first asserts that the delivery of Rogers to the State's Attorney's Office and his presence there on January 30 were not unlawful, while the second states that if there were illegality in that regard the accused was not aware of it, and it had no effect upon his confession. My brothers made much of this for reasons which are not clear to me. We are called upon to decide whether the admitted compulsion placed upon the accused transcended the bounds of due process. It would seem that the legality of his immediate detention would be a factor of some importance in making this test, while his knowledge or lack thereof of this one detail of illegality would be unimportant in the over-all picture of compulsion. *U. S. ex rel. Wade* v. *Jackson*, 2 Cir., 256 F.2d 7, 13, certiorari denied *Jackson* v. *U. S. ex rel. Wade*, 357 U.S. 908; . . . *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 66, 67 . . . " 271 F.2d at 376, 377 (R. 475, 476).

The state trial court's "finding" on the request for counsel, as noted, was a crucial factor in the end result reached by the courts below. The defectiveness of the state court "finding" was ample justification—whether that justification be termed a vital flaw or something else—for rejecting the state court "findings," hearing testimony, and making a new finding.

The sanctification imposed by the Court of Appeals on the defective "findings" will allow the State to take a life without affording what the district judge considers to be the minimum requirements of due process. Tolerance of such a result constitutes a completely unwarranted deference to the state's rights at the sacrifice of federal constitutional rights, and would surely render the Fourteenth

Amendment an "illusory safeguard." *Blackburn* v. *Alabama*, *supra*, 361 U.S. at 209.

B. The Plenary Hearing Held by the District Court on August 31, 1956 Without Objection by Respondent Was in Accord With the Dictates of This Court in *Brown* v. *Allen* and This Very Case.

In its initial opinion, the Court of Appeals, relying primarily "on the *Brown* v. *Allen* opinion as a whole and the expressed concern of this Court for federal-state relations" (R. 399), directed the district judge to make the necessary constitutional determination on the basis of the state trial judge's "findings." And, on appeal the second time, the court below affirmed Judge Smith's determination to ignore, under the "limitations now applied, . . . the impressions made on the trial here" (R. 434). In failing to allow Judge Smith to consider the testimony taken without objection by respondent, the court below blocked out of judicial being crucial underlying facts the existence of which the district judge had previously acknowledged, and thereby authorized the State of Connecticut to deprive petitioner of his life despite the constitutional deprivation which Judge Smith twice recognized.

This Court has, however, in *Brown* v. *Allen* and in the brief opinion in this very case, authenticated the propriety

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Quite significantly, the Court of Appeals for the Second Circuit appears to have lost its reverence for the Connecticut "Findings of Fact." In *Reid* v. *Richmond*, 277 F.2d 702 (2 Cir., 1960), a habeas corpus appeal decided after the opinion of the Court of Appeals in this action, the Court stated:

> "The Findings of Fact made by the State [Connecticut] trial judge shed some light on their [referring to the circumstances surrounding the making of the confessions] content, but due to the absence of the trial transcript, which we assume to be still available, we are reluctant to give these findings *any consideration*." 277 F.2d at 704 (Emphasis added).

of a district court holding a hearing on matters canvassed in the state court. In *Brown* v. *Allen*, *supra*, 344 U.S. at 463-4, Mr. Justice Reed acknowledged that "a repetition of the trial is not required,"[5] and then added, significantly, "However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution."

This pronouncement by Mr. Justice Reed, as well as the statement by Mr. Justice Frankfurter that "Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge *may* accept their determination in the State proceeding and deny the application," 344 U.S. at 506 (emphasis added)—to which this Court made pointed reference in its opinion denying certiorari (R. 418)—clearly endorse the propriety of the habeas corpus hearing held in this case. Ignoring the proper meaning of the statements by Mr. Justice Reed and Mr. Justice Frankfurter, the decision by the Court of Appeals to reject testimony adduced at the hearing without objection by respondent is, petitioner submits, the product of a discrepant interpretation of this Court's opinions in *Brown* v. *Allen*.

Moreover, it must be remembered that three separate cases—the procedural history of which differed in a significant respect—were decided together, under the name of *Brown* v. *Allen*. From the last paragraph of the Court of Appeals' initial opinion (R. 399), it is clear that the court below reached its conclusion to exclude the testimony which Judge Smith heard solely from this Court's consideration of *Brown* v. *Allen*, No. 32, the only one of the three cases dis-

[5] The statement to the effect that a hearing is not "required"—upon which the court below relied (R. 393)—is, of course, beside the mark here. Petitioner did not argue that the hearing was "required" but that it was within the court's discretion to hold the hearing.

posed of by the *Brown* v. *Allen* opinion where the District Court made its decision solely on the basis of the state record. However, in *Speller* v. *Allen*, No. 22, and *Daniels* v. *Allen*, No. 20, the District Court *did* hold hearings on the factual issues even though they had before them the full record of the state proceedings. In both of these cases the constitutional issues presented on habeas corpus had been determined in a hearing before the state court trial judge who had made specific findings on the issue, as the District Court pointed out in its decisions, reported *sub nom.*, *Daniels* v. *Crawford*, 99 F. Supp. 208, 213 (1951); *Speller* v. *Crawford*, 99 F. Supp. 92, 95 (1951).

There was no need for the court below to transpose from this Court's language in the situation where the District Court held no hearing to determine this Court's view when the District Court does hold a hearing. Mr. Justice Reed, speaking for the Court, noted no objection to the holding of a hearing in the *Daniels* case and specifically approved the propriety of the District Court holding a hearing in the *Speller* case although neither the District Court nor this Court had noted a "vital flaw" or "unusual circumstance" in the state proceedings:

> "The petition . . . raised again the same federal question which had been passed upon by both North Carolina courts and which had been offered to this court on petition for certiorari, racial discrimination. *The District Court heard all additional evidence the petitioner offered. This was in its discretion. Moore* v. *Dempsey;* 261 U.S. 86; *Barr* v. *Burford*, 339 U.S. at 214, cases which establish the power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. *It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.*"

Brown v. *Allen*, *supra*, 344 U.S. at 478. (Emphasis added.)

But, more to the point, the propriety of a plenary hearing was the precise issue to which this Court addressed itself *in this very litigation*, in its opinion denying certiorari from the first judgment of the Court of Appeals.[9] For this Court said that it "read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the state court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony" (R. 417, 418). This Court clearly stated that the district judge was not bound by the state court determination, and might take testimony, even though no "vital flaw" infected the state court inquiry.[10] But Judge Smith and the majority below transposed the equation and read this Court as insisting on a "vital flaw" or some "circumstance" closely approximating such fundamental error as the latchkey to a fresh federal inquiry into the underlying facts.

Judge Smith recognized that "on its face" this Court's opinion meant that:

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[9] Presumably there is no controversy that this Court's opinion established the law of the case for subsequent proceedings. Even though an opinion on denial of certiorari is unusual, "when the reasons are given, the decision to deny will have the effect indicated by the reasons stated." Opinion of Mr. Justice Frankfurter in *Brown* v. *Allen*, *supra*, 344 U.S. at 489. Nor can this be otherwise when the opinion construes the decision of a lower court; it is this Court's interpretation of the mandates of inferior federal courts which is decisive. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940); *Labor Board* v. *Donnelly*, 330 U.S. 219, 227 (1947).

[10] Commentators were quick to note that this Court, by its *per curiam* opinion on the denial of certiorari, recognized the propriety of the District Court holding a hearing. 1 Moore, Federal Practice par. 0.404 [6] n. 1 (2d ed. 1959); Notes, 58 Col. L. Rev. 895 (1958), 68 Yale L. J. 98, 103 (1958); Comment, 53 Northwestern L. R. 765, 772 (1959).

"... the District Judge, after examining the record of the state proceedings, is free to accept the state factual determinations in those proceedings and base his constitutional determination thereon, or to reject them and call for testimony on which to base his constitutional determinations, unless his examination of the state proceedings reveals some 'vital flaw,' in which instance the implication is that he cannot accept the state determination but *must* call for testimony" (R. 429). (Emphasis in original.)

In rejecting the "face" value view of this Court's opinion, the action of the courts below was premised on a manifestly incorrect reading of this Court's opinion. This Court's opinion was, as Judge Clark noted, an "actual denigration of our previous decision, while failing to reverse it outright" (R. 478). And, as Judge Clark emphasized:

"Naturally Judge Smith faced somewhat of a dilemma in having two appellate masters to serve, while he did have to act in the light of the fact that his earlier decision stood reversed. I am quite clear, however, that he was too modest and that under the Supreme Court ruling he was both entitled and bound to act normally as a judge and thus to credit his own natural and sincere judicial conclusions" (R. 479).

The testimony taken at the August 31, 1956 plenary hearing in the case at bar, then, is hardly entitled to be excluded, as the courts below have done. Moreover, even assuming, *arguendo*, the impropriety of holding the original hearing, the state's actions do not justify exclusion of the testimony taken. Respondent here made no objection to the taking of testimony, in its return to the writ (R. 169), at the hearing (R. 5-73), or on the motion for rehearing (R. 73-152, 182-194). It called witnesses on its own behalf and examined

those called on behalf of petitioner (R. 5-73). In the *Speller* case, at the outset of the hearing, the state filed a motion to discharge the writ without taking evidence. Reserving decision on this motion, the District Court held the hearing and took evidence. The state objected to every question asked by petitioner and moved to strike the answer in each instance. In every case where the state examined the witness, the questions were propounded after the state reiterated its objection to the taking of all the evidence. At the conclusion of the evidence, the state renewed its motion and it was denied, 99 F. Supp. at 95. If, under the *Speller* circumstances, a hearing "better enabled that court to determine whether any violation of the Fourteenth Amendment occurred," 344 U.S. at 478, a hearing in the case at bar, unobjected to by respondent, was certainly in order.

Even as late as the proceedings on remand, respondent conceded the propriety of the hearing in two important aspects: (1) whether or not petitioner received a warning of his rights during the prolonged interrogation of January 30, 1954 at the State's Attorney's office and (2) whether or not petitioner asked to consult his counsel during the afternoon interrogation prior to the arrival of Captain Eagan:

> "Mr. Ullman: Now, I say that that afternoon session in which there was an absence of testimony, the accused did not request counsel, is in the same category as if there were a point on which no finding was made. For instance, the State Trial Court did not make a finding that the accused was warned. I say that it is altogether conceivable that in the absence of such a finding, this Court can make a finding, but that isn't in the category of vital flaw; that is in the category of the additional evidence which the Court may receive even where there is no vital flaw, and that is set forth

in the clarifying opinion of the Circuit Court. Evidence excluded, or evidence as to which no finding is made on those points pertinent to the Constitutional issue, this Court may receive evidence, but it is not receiving it on the basis that there is a vital flaw." (Record on Appeal. 668-669).[11]

And, the hearing in one sense benefited the State. In the application for the writ, petitioner alleged he asked for counsel (R. 154). The state judge—with no evidence to the contrary—nevertheless made a contrary "finding." But in determining what action to take on the petition, the District Court was obligated to take allegations of undisputed facts in the petition as true. *Hawk* v. *Olson*, 326 U.S. 271, 277-79 (1945). At the hearing, then, respondent had an opportunity to refute petitioner's testimony, which it had not elected to do with the available detectives at the state trial (R. 432, 461). That Judge Smith found against the State after hearing the State's witnesses on this point (R. 176), does not, of course, justify a position that a hearing was not tolerable at the outset.

Most certainly, then, the August 31, 1956 hearing was in accord with the dictates of this Court. Respondent's tardy objection to the holding of a hearing only serves to emphasize that it was the conclusion arrived at as a result of the hearing, not the hearing itself, which disturbed the State. And, if there need be some "vital flaw" or unusual circumstance to justify the hearing, the character of the state court "findings"—as detailed in Judge Clark's dissent below—constitutes such a flaw or circumstance.

[11] By stipulation on file in this Court, the parties have agreed that reference may be made to unprinted portions of the record. The entire certified record is on file with the Clerk of this Court.

C. Judge Smith's Initial Conclusion That "The Confessions Were the Result of Pressure Overcoming Rogers' Power of Resistance" Should Be Reaffirmed by This Court Because This Conclusion—Arrived at Without Deference to the Defective State Court "Findings"—Is Fully Supported by the Evidence.

Upon emancipating the District Court from the restricted scope of review imposed by the Court of Appeals it is appropriate for this Court to examine the merits of the petitioner's constitutional claims upon the federal trial judge's consideration of the evidence taken at the August 31, 1956 hearing. Unhampered by the defective historical "finding" in regard to the request for counsel, Judge Smith, free to reflect on all the testimony and documentary evidence offered at the August 31, 1956 hearing (including the vast bulk of the testimony taken in the state trial court on the coercion issue), ruled that "The confessions were the result of pressure overcoming Rogers' power of resistance and were not voluntary on his part" (R. 177).

Upon consideration of a twelve-page affidavit (R. 182-194) attacking this conclusion, Judge Smith, in denying the State's request for a rehearing ruled again that the State's allegations were "not sufficient to support a finding on the main issue, the involuntary character of the first confession, at variance with the finding entered" (R. 195). And upon remand from the Court of Appeals and this Court, Judge Smith noted that:

"... there was the illegal removal from the jail to the office for interrogation, the illegal holding incommunicado, denial of access to his lawyer, questioning by different officers for some eight hours intermittently in relays, the faked phone calls about his wife and children, finally succeeding by inducing Rogers to aban-

don his denials and make the confession, repeated the next day before the coroner. Aside from the denial of access to counsel, the other circumstances might not singly or together have broken his resistance. On the facts as they appeared to this court, taken together, against the background of his knowledge that although he had counsel he would not be permitted to reach him, it seemed reasonable to conclude that they overbore his will to resist and brought about a confession not truly voluntary or free" (R. 434).

In holding the second statement likewise to be coerced, Judge Smith added:

"The next morning, January 31, the coroner gave an oral order that Rogers be held incommunicado. His counsel called at the jail, but on orders of the state's attorney was denied access to him. Rogers was taken to the coroner's office where he was for the first time warned of his rights not to make a statement and to have counsel, but still fearing that the threat to take into custody his wife and children would be carried out if the original confession was repudiated, he repeated it for the coroner. One or two days thereafter the order that he be held incommunicado was rescinded" (R. 177).

If this Court frees Judge Smith from the binding effect of the state court basic "findings"—as indeed, petitioner submits, it must—Judge Smith's initial ruling that both of petitioner's incriminating statements were coerced should be affirmed and this court should remand with instructions to issue the requested writ of habeas corpus.

In reviewing the decision of the court below on the merits, the question for this Court is whether Judge

Smith's initial ruling that the statements were coerced is "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. *Wade v. Mayo*, 334 U.S. 672, 682-684 (1948). Significantly, respondent has never claimed that Judge Smith's determination that the incriminating statements were coerced is clearly erroneous, although the State has previously argued that petitioner had a burden of presenting "clear and convincing" proof on the coercion issue. Actually, Judge Smith's conclusion that both of petitioner's statements were coerced was the only conclusion he could reach on the evidence properly before him.

Specific language in Judge Smith's remand opinion indicates he felt bound "by the findings of the state trial court that . . . the confessions were voluntary . . . " (R. 430). Even if this statement did not literally manifest Judge Smith's interpretation of his duty, it is clear that by binding Judge Smith exclusively to the defective state court "findings" and forcing him to reject the testimony taken without objection by respondent, the majority below, as Judge Clark noted, rendered "federal constitutional review of coerced confessions . . . quite, if not wholly, illusory" (R. 479) and forced the District Court to "rubber stamp the state holding" (R. 480).

II. Under This Court's Traditional Principles for Determining the Character of Confessions Challenged Under the Fourteenth Amendment, the Facts Undisputed on the State Trial Transcript Add Up to a Coercive Pattern Which Voids Petitioner's Incriminating Statements, His Conviction, and the Resulting Death Sentence.

Shorn of the added "embellishments" of the state court "findings"—many of which, as Judge Clark noted, "are quite obviously argumentative conclusions or deductions[12] which are not facts in any true sense" (R. 475)—the historical facts apparent from the face of the state court transcript demonstrate that the use of the two incriminating statements against petitioner was offensive to due process of law. Even if this Court were to endorse the Court of Appeals' obliteration of the testimony heard by Judge Smith, it should rectify the constitutional deprivation on the basis of the uncontradicted testimony in the state court transcript which indicates that the confessions were the "product of sustained pressure by the police" and not the "expression of free choice." *Watts* v. *Indiana*, 338 U.S. 49, 53 (1949).

Quite significantly, the tribunals which have approved the state trial court's use of the two confessions at issue

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[12] Judge Clark's comment is particularly appropriate in view of respondent's objections earlier that Judge Smith had overruled "six basic or underlying facts found by the state trier" (Brief for Respondent in opposition dated June 3, 1958, p. 10). These "facts" were Nos. 96, 99, 97, 100, 101 and 106 (R. 316, 317). A few moments' perusal of those "facts" will make it clear that Nos. 99, 97 and 106 are primarily inferences rather than "basic or underlying facts," and No. 96 and the first portion of No. 100 were not overruled (R. 176, 195). Only the finding on the request for counsel was rejected by Judge Smith. Judge Smith recognized this when, after comparing the state court finding on the counsel point with his own, he wrote: "In that respect the subordinate findings differ" (R. 433).

here—the District Court on remand, the Court of Appeals on the second appeal and the Connecticut Supreme Court of Errors on direct review of the murder conviction—have all considered themselves bound to the defective state court "findings." And the Supreme Court of Errors—without a single reference to any of this Court's long line of cases concerning the use of challenged confessions—adopted a standard in patent conflict with this Court's due process criteria. In an opinion by Chief Justice Wynne, the Connecticut Court held:

> "The question [of admissibility] is whether . . . that conduct induced the defendant to *confess falsely* that he had committed the crime being investigated. . . . There is nothing . . . to demonstrate that he was thereby forced to make an *untrue* statement . . . the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence *untrue* statement" (R. 222, 223). (Emphasis added.)

Yet only last term, this Court reiterated that it is "established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'" *Blackburn* v. *Alabama, supra,* 361 U.S. at 206.

Measuring the totality of the circumstances—which are uncontroverted on the state record—surrounding the exaction of the two incriminating statements against the criteria established by this Court in a long line of cases commencing with *Brown* v. *Mississippi,* 297 U.S. 278 (1936), the use of the two confessions here is inconsistent with the Fourteenth Amendment under "traditional principles." *Spano* v. *New York,* 360 U.S. 315, 320 (1959).

A. As to the Illegal Removal From the Jail.

Petitioner, at the time of his lengthy interrogation of January 30, 1954 was confined by court order to the county jail until "discharged by order of law" (Pet. Ex. B, R. 486, 6). In contravention of that order and Connecticut law, §54-15 (Conn. Gen. Stat., 1958 Rev.), petitioner was illegally removed by virtue of a letter from the State's Attorney's office (Pet. Ex. C, R. 266, 10). The state trial judge, to be sure, found no illegality in this removal, but the Supreme Court of Errors noted that "proper court authorization should have been secured before the defendant was removed from jail" and termed the removal "illegal" (R. 223).

The majority below argues that this illegality could not have affected the voluntariness of petitioner's confession because he was unaware of it (R. 463). This court has, however, consistently considered illegal detention as a relevant circumstance of coercion without regard to whether or not the suspect was aware of the illegality. *Turner* v. *Pennsylvania*, 338 U.S. 62, 64, 66, 67 (1949); *Ward* v. *Texas*, 316 U.S. 547, 552, 553, 555 (1942); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152 (1944); *Malinski* v. *New York*, 324 U.S. 401, 412, 417 (1945) (separate opinion of Frankfurter, *J.*).

Moreover, the position of the majority below ignores the "complex of values" which "underlies the stricture against use by the state" of involuntary confessions:

> "But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, 'The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforc-

ing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. New York, supra (360 US at 320, 321)." *Blackburn* v. *Alabama*, 361 U.S. at 207.

It is this consideration which prompted Justice O'Sullivan, in dissenting in the Supreme Court of Errors, to note: "Those who become suspect do not thereby become the chattels, so to speak, of the investigators" (R. 229).

B. As to the Lack of Warning.

Ignoring the well-established principle that failure to warn an accused of his rights is a consideration in determining the coerced nature of confessions, *Haley* v. *Ohio*, 332 U.S. 596, 601 (1948), the court below likewise ignored this significant testimony of Chief Eagan at the state trial:

"Q. Did you tell him that he was entitled to the advice of an attorney? (Tr. p. 454)

"Mr. Ullman: Object to that, if your honor please. I know of no such rule.

"Mr. Corse: Did your honor rule? I didn't hear.

"The Court: Well, I will allow it to be answered. I will overrule the objection.

"The Witness: Ask the question.

"(Question read.)

"The Witness: I did not.

"Q. Did you tell him that anything he said would be used against him? A. I did not.

"Q. Did you tell him that he didn't have to say anything to you? A. No, sir, I did not.

"Q. In your direct examination, answering Mr. Ullman's questions regarding—preliminary to the state-

ment, you were speaking only of the period between eight and ten-twenty? A. That's right, sir.

"Q. You don't know what somebody else might have said to him before that time? A. I do not" (R. 237).

C. As to Prolonged Questioning.

The interrogation period—during which petitioner was questioned by police officers in relays—lasted over nine hours before he gave in and confessed at about 10:30 (R. 240, 242). In *Haley* v. *Ohio, supra,* this Court held a confession, produced after only five hours of interrogation where an uneducated Negro accused was without benefit of counsel and unwarned of his rights, was not voluntary. Only the age of the accused in the *Haley* case made the circumstances there less in accord with the dictates of due process.

And more recently in the *Spano* and *Blackburn* cases, where the accused were adults, this Court has held an interrogation of eight hours, in connection with other circumstances, to be productive of coerced confessions.

D. As to the Threat by Chief Eagan.

Petitioner's wife—the court below noted in an attempt to minimize Chief Eagan's threat—was a legitimate subject of police inquiry (R. 464). Yet neither the court below nor the State at any time has transposed that "legitimate" inquiry into a legitimate *purpose.* This they are unable to do because of Chief Eagan's frank admission that he faked the call to have petitioner's ailing wife and foster children brought into custody (R. 234)—after telling petitioner he would be "less than half a man" if he permitted his arthritic wife (R. 245) to be brought down (R. 202)—for the purpose of impressing petitioner with the advisability of giving the statement he sought (R. 200, 234). If

legitimate inquiry were his purpose, there would be no need or justification for a fake call to Mrs. Rogers.

That threats as to conduct to be employed against other persons can be considered in determining whether the accused has been denied due process is clear from *Harris* v. *South Carolina*, 338 U.S. 68 (1948). In *Harris*, after detailing the extensive interrogation which the police conducted against the accused, this Court in invalidating the confession in issue, noted:

> "Petitioner continued to deny implication in the killings. The sheriff then threatened to arrest petitioner's mother for handling stolen property. Petitioner replied, 'Don't get my mother mixed up in it and I will tell you the truth.' Petitioner then stated in substance what appears in the confession introduced at the trial. The session ended at midnight." 338 U.S. at 70.

And in the recent *Spano* case, the petitioner's concern, falsely aroused, for the livelihood of a friend on the police force, was an instrumental factor in this Court's invalidating a subsequent confession. In *Spano*, unlike here, the petitioner had had consultation and advice from his attorney.

E. In Combination, Both of Petitioner's Statements Were Involuntary Under Traditional Principles.

The state trial judge, months after the trial, made a "finding" contrary to petitioner's uncontradicted testimony in the state trial court. Such a finding, as argued elsewhere in this brief, cannot, the petitioner maintains, foreclose this Court from consideration of petitioner's uncontroverted testimony in the record. Petitioner's undisputed testimony, then, that he asked to see his counsel during the early portion of the interrogation is properly an element affecting the character of the confessions. *Haley* v. *Ohio*, *supra*, 332

U.S. at 600; *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957). However, if petitioner's testimony that he requested counsel is disregarded, the combined pressures, all apparent from the state court transcript, add up to a coercive pattern, as Judge Clark so aptly summarized:

> "Note that whether or not relator made the request to see his counsel, it is clear that the police took no steps to remind him of his right to counsel or put him in touch with his lawyer [R. 237], although they knew he had a lawyer and who the lawyer was [R. 241, 484]. It is also admitted that the next day when relator was before the coroner his lawyer was specifically refused access to him [R. 254, 114]. The pattern is clear, too, of a steady grilling [R. 242] while he was handcuffed to a chair [R. 241]; and when he did not break down, Chief Eagan was called in [R. 203], who employed the ruse of pretending to send for his crippled wife, with the final compulsory admonition that he would be 'less than half a man' [R. 202, 242] if he forced them to take his wife and children into custody. Surely by then he had to realize that he had only a dim future unless he confessed" (R. 474, 475).[13]

And the second statement given the next day to the coroner is likewise invalid. The coroner testified that "I left instructions that he wasn't to see anybody; that he was to be held incommunicado until I lifted that order" (R. 254).[14]

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[13] The bracketed record references added to Judge Clark's opinion are all to testimony in the state record.

[14] For justification for issuing his incommunicado order, the coroner relies on §6-70 (Conn. Gen. Stat., 1958 Rev.) which authorizes him to keep witnesses "separate so they cannot communicate with one another." Pursuant to these instructions, petitioner's privately retained counsel was prohibited from consulting with petitioner at the jail on January 31, 1954 (R. 318).

Made only fourteen hours after petitioner was returned to the jail from the State's Attorney's Office (while he was in illegal custody) and to an official who admitted that the impetus for his interrogation came from his knowledge of the previous statement to the police (R. 250, 318), the second incriminating statement must fall with the tainted first incriminating statement. "All were simply parts of one continuous process." *Lyra* v. *Denno*, 347 U.S. 556, 561 (1954).

As pointed out by Mr. Justice Murphy, "Subsequent confessions should automatically be invalid unless there is proof beyond all reasonable doubt that such an atmosphere has been dispelled and the accused has completely regained his free individual will." *Malinski* v. *N.Y.*, 324 U.S. 401, 433 (1945).

III. The State's Denial of Effective Consultation With Counsel Was, in Itself, a Fatal Lack of Due Process and Is a Ground Upon Which This Court Should Reverse the Court Below and Order the Writ to Issue.

Throughout these proceedings, petitioner has maintained —as a separate, due process objection to his state court conviction—that in denying him an opportunity for consultation with his privately-retained lawyer at two significant stages in the proceedings, the State abridged his right to counsel in violation of the Fourteenth Amendment's requirement of due process of law.

Five justices of this Court have now determined that the unconstitutional absence of counsel in itself renders resulting confessions inadmissible under the Fourteenth Amendment even though they might otherwise be voluntary under traditional principles. To be sure, a majority of this court in the recent case of *Crooker* v. *California*, 357 U.S. 433, 439 (1958), left unanswered the question of whether or not

a confession found to have been otherwise voluntarily given under the coerced confession doctrine must be excluded on the ground that it was made during a period of an unconstitutional denial of counsel. The majority in *Crooker* did not need to face this question because it held there had been no denial of counsel. But the four justices who dissented in the *Crooker* case indicated that the denial of counsel in itself vitiated the resulting confession. 357 U.S. at 441-448. And, more recently, in *Spano* v. *New York*, 360 U.S. 315, 324-327 (1959), Mr. Justice Stewart—concurring with Mr. Justice Douglas and Mr. Justice Brennan while a majority excluded the confessions under traditional principles—noted that an unconstitutional denial of counsel renders the resulting confession inadmissible. The denial of counsel in the case at bar, then, furnishes an additional basis for this Court to remand to the District Court with instructions to grant petitioner's writ of habeas corpus.

Even if this Court should fail to emancipate the District Court from the binding effect of the state trial court's "findings of fact," the writ of habeas corpus should issue on the basis of a denial of the right to counsel. Petitioner concedes that if the constitutional determination must be made *exclusively* on the state court's "findings," without reference to the state trial transcript or evidence taken at the August 31, 1956 hearing (R. 4-73), then the denial of counsel at the State's Attorney's office cannot be considered. But the state trial court specifically found that on the day following the interrogation at the State's Attorney's office, petitioner's own counsel sought and was denied permission to consult with him at the county jail. The state court finding in this regard was:

> "114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was

informed by the Sheriff that the accused was being held incommunicado on the Coroner's order" (R. 318).

Therefore, if petitioner's position on the duty of the District Court to reject the state court's defective "findings" is sustained, this right to counsel argument involves two denials of the right to consultation with counsel. If, on the other hand, the courts below were not in error in limiting Judge Smith's scope of review, there still stands on the state record—as a "finding," which in this instance is fully supported by the testimony—the undisputed fact that on the second day petitioner's attorney was not allowed to consult with his client at the jail. Regardless of how this Court rules on the issues of the District Court's right to hold a hearing and its duty to determine underlying facts anew, the issue of the denial of the right to counsel at the jail is, therefore, before the Court.

Under the minimal standards prescribed by this Court in state capital cases, it is clear that once "charges are made in a criminal proceeding, he [the accused] may demand the presence of his counsel for his defense." *In re Groban's Petition*, 352 U.S. 330, 333 (1957).

Here, Harold D. Rogers—like Vincent Joseph Spano, but unlike John Russell Crooker, Vincent Cicenia, and Harry and Nathan Groban—had formal criminal charges lodged against him when the State denied him access to counsel. On January 13, 1954, on the basis of a criminal complaint filed against him on the unrelated attempted robbery charges, petitioner had been adjudged probably guilty of a grave crime (R. 176; Pet. Ex. B, R. 485, 6). Furthermore, at the time that he was questioned, petitioner was not held prisoner by the police merely for investigatory purposes. He had been committed to the county jail to insure his appearance at his future trial and he was officially

a prisoner of the Superior Court, the state's court of general criminal jurisdiction (Pet. Ex. B, R. 486, 6). True, the crimes for which he was being held by virtue of the January 13, 1954 bindover proceeding were not related to the crime for which the State now seeks his life. However, it was not until March 2, 1954 that petitioner was indicted by a grand jury (R. 171) for murder. If the absolute right to counsel ordained in this Court's recent decisions is not applicable in the case at bar, the police officers and the coroner would be at liberty to prevent, for a period in excess of two months, consultation with the lawyer petitioner had hired to represent him. Quite significantly, since the State had petitioner in custody on the attempted robbery charges it acted without haste in pressing formal murder charges against him. If the State can avoid its constitutional obligation in this fashion, it could, indeed, go far toward placing "the liberty of every man in the hands of every petty officer." *In re Oliver*, 333 U.S. 257, 273 (1948).

Once the attempted robbery charges, then, were made against petitioner his constitutional right to consult his own attorney became operative, irrespective of the amount of prejudice resulting from the denial, and petitioner was within the protection of this Court's unanimous declaration in *Chandler* v. *Fretag*, 348 U.S. 3, 9, 10 (1954):

> "Regardless of whether petitioner would have been entitled to appointment of counsel, his right to be heard from his own counsel was unqualified . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel."

That there need be no specific showing of prejudice from the denial is clear from *Glasser* v. *U.S.*, 315 U.S. 60, 76 (1942), where this Court pointed out:

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

To be sure, the *Glasser* case involved a federal prosecution. But in a state court capital case—as opposed to non-capital cases—the Fourteenth Amendment right to counsel, once criminal charges have been made, is coextensive with the Sixth Amendment right to counsel afforded defendants in federal criminal prosecutions. *Tompkins* v. *Missouri*, 323 U.S. 485, 487 (1945); *Williams* v. *Kaiser*, 323 U.S. 471, 475 (1945). In *Kaiser*, this Court recognized that the *Glasser* rule applies to review of state court capital cases.

Petitioner is not asserting that the State must allow consultation under all circumstances. It is conceded that the State can take reasonable precautions to safeguard its prisoners or to provide for the orderly operation of its jail, and that the State could not be forced to go to unreasonable efforts to determine the identity of the accused's lawyer or his whereabouts. But the two crucial interferences by the State in the case at bar were clearly unreasonable. Two of the police officers who interrogated petitioner at the State's Attorney's office admitted that they knew whom petitioner had retained as counsel (R. 45, 48, 60). One of these had even been present in the city court when petitioner was represented by his counsel at an earlier hearing on the attempted robbery charges (R. 60). The sheriff testified that the attempted attorney-client consultation by petitioner's counsel would not have disturbed the jail discipline (R. 18). And the deputy jailer, keeper of the jail at the time of the attempted consultation, testified that it was the coroner's incommunicado order that pre-

vented petitioner from consulting with his private counsel at the jail (R. 11, 13).

However, even if the less stringent right to counsel standards—applicable to noncapital cases, *Betts* v. *Brady*, 316 U.S. 455 (1942), and capital cases where there is at issue only the right to counsel prior to the time the State charges a crime, *Crooker* v. *California*, 357 U.S. 433 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504 (1958)—are applicable here, petitioner suffered a denial of due process. The circumstances of the case at bar emphasize that at the most critical period of the proceedings against petitioner—at, and immediately prior to, two interrogations during which two alleged confessions were exacted and at times when consultation was vitally important—petitioner was denied the aid of his own attorney. The action of the State resulted in petitioner being without counsel from the very instant he knew he was a suspect in a murder case until he had twice confessed to a crime for which the state seeks to electrocute him.

It should be emphasized that petitioner is not a college graduate with a law school training in criminal law as was the accused in the *Crooker* case. Mr. Justice Clark, in applying the less stringent standard of the *Crooker* case attached great import to that fact:

> "... the sum total of the circumstances here during the time petitioner was without counsel is a voluntary confession by a college-educated man with law school training who knew of his right to keep silent." 357 U.S. at 440.

In both *Crooker* and *Cicenia*, this Court expressed "strong distaste" over the denial of counsel, but felt its objections could not be elevated to the level of constitutional infirmities since the denials there at issue occurred prior to the

time the accused were charged with crimes. One of the crucial reasons for this Court's refusal to adopt the stricter, "unqualified" counsel standards was its concern for the effect the absolute right to consult might have on normal police interrogation. This is made clear in the *Cicenia* case by Mr. Justice Harlan's reliance, 357 U.S. at 509, on the concurring opinion of Mr. Justice Jackson in *Watts* v. *Indiana*, 338 U.S. 49, 57-62 (1949). To have held that the accused in the *Crooker* and *Cicenia* cases were entitled to counsel during the period police were interrogating them would "constrict" police investigation, this Court decided. However, in the case at bar, in one of the two instances when petitioner was denied counsel—at the jail on January 31, 1954—there was no investigation taking place. For petitioner's attorney attempted to consult his client at about noon (R. 318), approximately five hours before petitioner was removed from the jail for interrogation by the coroner (R. 248). In respect to one of the petitioner's two counsel claims, then, the basic policy consideration for which this Court restricted the right to counsel in *Cicenia* and *Crooker* is missing in the case at bar. This clearly tips the balance in petitioner's favor on his second claim of deprivation of counsel, even if the less stringent, pre-charge, *Crooker-Cicenia* doctrine is applied.

In this capital case involving the right to counsel after charges had been made, this Court need not concern itself about "nice calculations as to the amount of prejudice" arising from the State's denial of the consultation at the State's Attorney's office or at the jail. When the State blocked the two consultations between petitioner and his attorney, petitioner's "unqualified" right to counsel, under the *Chandler* doctrine, was destroyed, for he was not given every "reasonable opportunity to employ and *consult* with counsel," as the *Chandler* case commands. 348 U.S. at 9, 10. And even under the less stringent standard arguably ap-

plicable to the period prior to the filing of charges against an accused, there was a resulting unfairness to this little-educated petitioner which due process standards will not tolerate. Confessions exacted after such denials, five justices of this Court now believe, cannot, consistently with Fourteenth Amendments standards, be used in a criminal prosecution by which the State seeks to forfeit a human life. To rule otherwise in this case would only serve to dilute the firmly established, quarter-century old principle that an accused is entitled to "the guiding hand of counsel at every stage of the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932). From the time he knew he was a murder suspect until after the State had exacted two confessions—when consultation, preparation and thorough-going investigation were vitally important—petitioner, held incommunicado (R. 176), did not have every reasonable opportunity to consult counsel, although he was "as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama, supra*, 287 U.S. at 57.

Conclusion

Under the limited scope of review prescribed by the court below, petitioner's life will be sacrificed despite the constitutional deprivation which former Chief Justice O'Sullivan of Connecticut, Chief Judge Smith of the District Court of the District of Connecticut and Judge Clark of the Second Circuit all recognize to exist. If this Court does not instruct the District Court to issue the writ, a crucial "finding" admittedly without evidentiary support will be the decisive factor in the taking of a human life.

Judge Smith's original conclusion—imputing unconstitutional action to state officials in a criminal case—was not a hastily conceived one. It was the first such finding in Judge

Smith's 17 years as a distinguished federal judge. The endorsement of Judge Smith's original conclusion—by Judge Clark—who has expressed repeated reluctance to overturn state court convictions—emphasizes the gravity of the constitutional deprivation at issue here.

It is respectfully submitted, therefore, that the judgment of the Court of Appeals be reversed and that this cause be remanded to the District Court with instructions to issue the requested writ of habeas corpus invalidating the two incriminating statements, petitioner's conviction for murder and the resulting death sentence so that petitioner is not deprived of his life without due process of law.

Respectfully submitted,

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New Haven, Connecticut

JACOB D. ZELDES
955 Main Street
Bridgeport, Connecticut

Counsel for Petitioner

August 25, 1960

Appendix A

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
SIXTH	
HEARING ON ADMISSIBILITY OF EXHIBIT VV	HEARING ON ADMISSIBILITY OF EXHIBIT VV
The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.	The State through Assistant Chief of Police Raymond Eagan sought to offer in evidence the statement made by the accused on the night of January 30, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.
On the evidence adduced on this issue the following facts were proven:	On the evidence adduced on this issue the following facts were proven:
71. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating that she had died from bullet wounds during the course of a robbery committed by a person unknown.	1. On Saturday, November 21, 1953, the body of Mrs. Dorothy Kennedy was found in the West Shore Package Store under circumstances indicating that she had died from bullet wounds during the course of a robbery committed by a person unknown.
72. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.	2. Thereafter investigations into this crime were conducted by the West Haven Police and other prosecuting authorities to no avail.
73. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.	3. On the evening of January 9, 1954, the New Haven Police arrested the accused on charges of crime committed that day at the Travelers Hotel in New Haven.
74. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.	4. At the time of his arrest the accused had in his possession a loaded 38 calibre Smith & Wesson revolver.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney.*
75. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.	5. The accused was questioned by police that evening and claimed he had won the gun in a "crap game" that day.
76. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.	6. On being questioned further on the following day the accused admitted having stolen the gun from the home of his nephew George Evans.
77. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.	7. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.
78. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.	8. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.
79. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.	9. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.
80. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.	10. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
81. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.	11. Thereupon a letter from the State's Attorney's Office was delivered to the Jailer requesting him to permit police officers to take the accused to the State's Attorney's Office for questioning.
82. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.	12. In compliance with this request, the accused was presented at the State's Attorney's Office shortly after noon.
83. During his first hour at the State's Attorney's Office the accused was not questioned at all.	13. During his first hour at the State's Attorney's Office the accused was not questioned at all.
84. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.	14. Thereafter on questioning by the officers he denied knowledge of or implication in the murder of Mrs. Kennedy.
85. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.	15. During this questioning and at all times while at the State's Attorney's Office the accused was seated in an armchair, his handcuffs released so that the cuffs were attached to only one wrist and his hands and arms free.
86. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.	16. The accused was permitted to smoke cigarettes and did smoke during the afternoon and evening, some of the cigarettes being furnished by police officers in attendance.
87. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.	17. At about 4 o'clock in the afternoon he was given a sandwich and coffee which he consumed.
88. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 p.m. and	18. In response to a telephone call Assistant Police Chief Eagan arrived at the State's Attorney's Office about 8 P.M. and

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
thereupon proceeded to question the accused further.	thereupon proceeded to question the accused further.
89. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.	19. The accused persisted in his denials and during the course of the questioning Chief Eagan informed the accused he was intending to send for the accused's wife in order to question her as to any knowledge she might have of the affair.
90. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.	20. Chief Eagan then pretended to put through a telephone call to Police Headquarters stating, in the hearing of the accused, that he would call the officers later with respect to sending for Mrs. Rogers.
91. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.	21. During the hour following this fictitious call Chief Eagan questioned the accused further and also asked him if he wanted anything to eat and the accused requested coffee.
92. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.	22. Chief Eagan then indicated he was ready to call the officers again to instruct them to bring Mrs. Rogers to the State's Attorney's Office whereupon the accused announced his readiness to make a statement.
93. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.	23. After a few brief admissions by the accused, one of the Official Court Reporters was summoned and a stenographic record was made of the statements made by the accused in response to questions by Chief Eagan, which statement is Exhibit VV.
94. At the conclusion of the statement the accused signed the stenographic notes.	24. At the conclusion of the statement the accused signed the stenographic notes.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
95. Although the statement started about 10:40 p.m. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.	25. Although the statement started about 10:30 P.M. and ended about midnight there were interruptions for coffee, cigarettes and short recesses.
96. At no time was the accused subjected to continuous or extended questioning.	26. At no time was the accused subjected to continuous or extended questioning.
97. No force, threats or inducements were made or offered to the accused at any time.	27. No force, threats or inducements were made or offered to the accused at any time.
98. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.	28. The accused acknowledged at the trial that he was not abused and made no complaint at any time of his treatment by the police.
99. The treatment of the accused by the investigators was at all times considerate.	29. The treatment of the accused by the investigators was at all times considerate.
100. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.	30. The accused had experienced previous arrests and interrogations by the police and the treatment accorded him on this occasion did not adversely affect him.
101. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.	31. The accused did not at any time on the day of the questioning request the presence or assistance of an attorney.
102. The accused answered the questions put to him directly and unhesitatingly.	32. The accused answered the questions put to him directly and unhesitatingly.
103. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.	33. The pretense of placing a telephone call for Mrs. Rogers had no tendency to produce a confession that was not in accord with the truth.
104. Neither at the trial or in his Claims of Proof on this Appeal did the accused make	34. Neither at the trial or in his Claims of Proof on this Appeal did the accused make any

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
any claim that his statement admitting the shooting of Mrs. Kennedy was untrue.	claim that his statement admitting the shooting of Mrs. Kennedy was untrue.
105. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful.	35. The delivery of the accused to the State's Attorney's Office and his presence there on January 30th were not unlawful.
106. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.	36. If there was any element of irregularity or illegality in his presence at the State's Attorney's Office on that date, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession.
107. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.	37. The statement made by the accused to the police on this date was freely and voluntarily made and accordingly was admissible in evidence.
SEVENTH	
HEARING ON ADMISSIBILITY OF EXHIBIT WW	HEARING ON ADMISSIBILITY OF EXHIBIT WW
The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.	The State through Coroner James J. Corrigan sought to offer in evidence a statement made by the accused at the Inquest conducted by the Coroner on January 31, 1954, whereupon the Court in the absence of the Jury conducted a hearing on the admissibility of such evidence.
On the evidence adduced on this issue, the following facts were proven:	On the evidence adduced on this issue, the following facts were proven:

"Findings" of the State Trial Court

108. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

109. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

110. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

111. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from the ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

112. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed that he was issuing a

Suggested "Findings" Submitted by the State's Attorney

1. On January 13, 1954, the accused was bound over by the City Court of New Haven to the April Session of the Superior Court on charges of Attempted Robbery while Armed, Breaking and Entering, Theft, and Carrying a Revolver in Motor Vehicle.

2. In the hearing of these charges in the City Court the accused had retained Attorney Thomas R. Robinson as his counsel but no appearance had been filed by any attorney on behalf of the accused in the Superior Court proceedings.

3. Following the City Court hearing the accused in default of bail was lodged as a prisoner in the New Haven County Jail on the mittimus issued by the Clerk of that Court.

4. On the morning of January 30, 1954, the State's Attorney's Office of New Haven County ascertained from ballistic tests that the gun found in the possession of the accused at the time of his arrest on January 9, 1954, had fired the bullets which killed Mrs. Kennedy on November 21, 1953.

5. During the morning of January 31, 1954, James J. Corrigan, Coroner for New Haven County, was informed that the accused had on the preceding evening confessed to the police his murder of Mrs. Kennedy, and the Coroner thereupon instructed the Sheriff that he was

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
warrant to hold the accused incommunicado at the County Jail.	issuing a warrant to hold the accused incommunicado at the County Jail.
113. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.	6. During that morning Coroner Corrigan was for several hours engaged in the investigation of a gas explosion that caused several deaths that day.
114. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.	7. About noon on that day Attorney Chester T. Corse, an office associate of Attorney Robinson, asked the Sheriff for permission to see the accused and was informed by the Sheriff that the accused was being held incommunicado on the Coroner's order.
115. Shortly afterwards, the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.	8. Shortly afterwards the Coroner's warrant was delivered to the Sheriff at the Jail directing him to hold the accused at the County Jail pending further orders from the Coroner.
116. In the late afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.	9. In the late afternoon of that day the Coroner telephoned the Sheriff and asked that the accused be brought to the Coroner's Office for questioning.
117. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.	10. Thereupon the Sheriff delivered the accused to the Coroner's Office and the Coroner administered to the accused the usual oath.
118. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.	11. Before proceeding to interrogate the accused, the Coroner cautioned him as to his constitutional rights, informing him that he was under no duty to answer questions and that he had the right to refuse to give testimony and that any testimony he might give might be used against him.

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
119. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.	12. The accused was further told by the Coroner that he had the right to be represented by counsel if he wished.
120. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.	13. The accused after hearing the cautionary remarks of the Coroner, stated that he understood his rights and averred his willingness to testify.
121. No threats of harm or promises of reward were made by the Coroner to the accused.	14. No threats of harm or promises of reward were made by the Coroner to the accused.
122. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.	15. The accused understood the language used by the Coroner and the rights afforded to him under the Constitution of the United States and the laws of this State.
123. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.	16. The accused is highly intelligent and fully comprehended the statements made to him by the Coroner.
124. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.	17. The accused was the brother of a police officer and had experienced previous arrests and interrogations by the Police.
125. The accused did not ask to be represented by counsel.	18. The accused did not ask to be represented by counsel.
126. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.	19. The accused voluntarily chose to testify after hearing from the Coroner that he was entitled to counsel and that anything he said might be used against him.
127. The accused answered the questions calmly and voluntarily.	20. The accused answered the questions calmly and voluntarily.
128. The questioning by the Coroner lasted about an hour and one-half and thereupon the	21. The questioning by the Coroner lasted about an hour and one-half and thereupon the

"Findings" of the State Trial Court	*Suggested "Findings" Submitted by the State's Attorney*
accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.	accused was returned by the Sheriff to the County Jail and his incommunicado status was released the following day.
129. The delivery of the accused to the Coroner's Office and his presence there for questioning were not unlawful.	22. The delivery of the accused to the Coroner's Office and his presence there for questioning were not unlawful.
130. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.	23. If there was any element of irregularity or illegality in his presence at the Coroner's Office on that day, the accused was not aware of it and it had no effect upon him and there was no causal connection between it and his confession to the Coroner.
131. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.	24. The statement made by the accused to the Coroner was substantially the same as that made by him the previous evening to the Police.
132. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.	25. The statement of the accused was freely and voluntarily made and accordingly was admissible in evidence.

"Findings" of the State Trial Court

(The above "findings" are set forth in the state court record on appeal (R. 314-320) and are set forth as an appendix to the majority opinion in the court below (R. 465-472).)

Suggested "Findings" Submitted by the State's Attorney

STATE OF CONNECTICUT
NEW HAVEN COUNTY
SUPERIOR COURT

I, Edward Horwitz, clerk of the Superior Court within and for New Haven County, in the State of Connecticut, and keeper of the records and seal thereof, hereby certify that the above and foregoing seven pages are true copies of pages 5 through 11 of the Counterfinding totaling fourteen pages filed on behalf of the State of Connecticut on September 9th, 1954 by Abraham S. Ullman, State's Attorney, in the case of State of Connecticut vs. Harold D. Rogers, #9995, all as on file in the records of this Court.

In testimony whereof I hereunto set my hand and affix the seal of said court, at New Haven, in said county, this 4th day of November, 1959.

[SEAL]

ss. Edward Horwitz Clerk.

Appendix B

STATUTES INVOLVED

28 USC (1952)

§2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States: or

• • •

(5) It is necessary to bring him into court to testify or for trial.

§2242. Application.

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held. (June 25, 1948, ch. 646, 62 Stat. 965.)

§2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

* * *

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. (June 25, 1948, ch. 646, 62 Stat. 965.)

§2245. Certificate of trial judge admissible in evidence.

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place. (June 25, 1948, ch. 646, 62 Stat. 966.)

§2246. Evidence; depositions; affidavits.

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discre-

tion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits. (June 25, 1948, ch. 646, 62 Stat. 966.)

§2247. Documentary evidence.

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence. (June 25, 1948, ch. 646, 62 Stat. 966.)

Conn. Gen. Stat. (1958)

§6-70. Power of coroner in securing evidence.

For the purpose of securing evidence, the coroner may enter any and all places in his county and shall have power to issue a warrant for a jury inquest, to compel the attendance and testimony of witnesses by subpoena and capias issued by him or other proper authority and to punish for contempt to the same extent as trial justices may in criminal cases. He may order and cause witnesses to be kept separate so that they cannot communicate with one another until they have testified. He may order or cause any person or persons whom he has good reason to suspect of having criminally caused the death in regard to which he is holding an inquest to be arrested and committed to the county jail or other proper place. He shall have power to take bail in such cases or to commit without bail when in his opinion the person arrested is guilty of a capital offense and when the proof against such person is evident or the presumption great. When bail is taken, it shall be to the state and shall be conditioned for the appearance of the person so arrested before the superior court for such county at its next criminal session. Any person so arrested and admitted to bail may be rearrested and committed by the coroner without bail when, in the opinion of the coroner, the proof is

evident or the presumption great that such person is guilty of a capital offense. In no case shall any person be kept under arrest by an order from a coroner for a longer time than twenty-four hours after the finding of a verdict by the jury or after the finding by the coroner in such inquest, and, at any time before such finding, whenever the grounds on which a person is so arrested cease to exist in the opinion of the coroner, he shall order the release of such arrested person. (1949 Rev., S. 485.)

§54-15. Binding over on probable cause.

When any complaint for any criminal matter cognizable by the superior court is legally brought before a trial justice, he may inquire into the facts relating thereto; and, if he finds that probable ground exists for its support, he may, if the offense is bailable, order the accused to enter into a recognizance with surety to the state, conditioned that he shall appear before the criminal term of the superior court next to be held in the county where such bond is taken, to answer to the complaint and abide the order or judgment of said court thereon; and, on his failure to enter into such recognizance, or if the offense complained of is not bailable, such trial justice shall order him to be committed to the jail in such county until the next criminal term of said court or until he is discharged by due course of law; but all cases of binding over by trial justices, or by any city, borough, police or town court, in the county of New Haven, within the judicial district of Waterbury, shall be to the criminal term of the superior court next to be held at Waterbury; and all cases of binding over in New Haven county outside of said judicial district shall be to the criminal term of the superior court next to be held at New Haven. (1949 Rev., S. 8727; November, 1955, S. N230.)